Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

JAMES B. MAYNARD,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether a railroad's locomotive has been put in use, or is being permitted to be used, on the railroad's line for purposes of the Boiler Inspection Act when it has been inspected, repaired and serviced at a maintenance facility and has been released from that facility and delivered to a railroad yard and is being used by employees engaged in or connected with the movement of that engine?

LIST OF PARTIES

The Petitioner is James B. Maynard

The Respondent is Norfolk and Western Railway Company

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OPINIONS IN COURTS BELOW

On January 5, 1994, the United States District Court for the Western District of Virginia, at Abingdon (hereinafter referred to as "District Court") entered an Order and Memorandum Opinion which denied James B. Maynard's (hereinafter "Maynard") Motion for Summary Judgment and granted Norfolk and Western Railway Company's (hereinafter "Norfolk and Western") Motion for Partial Summary Judgment as to Maynard's claim in Count I of the Amended Complaint based upon the Boiler Inspection Act. (App. 1-15)

This case was tried before a jury on January 5, 6, and 7, 1994. On January 7, 1994, the jury returned a verdict for Norfolk and Western on Count I and II of the Amended Complaint. (App. 16-17) On January 10, 1994, the District Court entered judgement in favor of Norfolk and

Western. (App. 18)

On February 8, 1994, the District Court entered an Order which denied Maynard's Motion to Set Aside the Verdict and to Grant a New Trial and ordered that this case be stricken from its docket and thereby entered judgment in favor of Norfolk and Western. (App. 19)

Maynard timely filed and served his Notice of Appeal on February 18, 1994. (App. 20-21) On March 27, 1995, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's Order of February 8, 1994 in an unpublished per curiam opinion. (App. 25-30)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals for the Fourth Circuit which was entered on March 27, 1995. This Petition for Writ of Certiorari is timely filed.

RELEVANT STATUTES

45 U.S.C. § 23 of the Boiler Inspection Act provides:

Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.
(As amended June 22, 1988, P. L. 100-342, § 14(2), 102 Stat. 632.)

STATEMENT OF THE CASE

Petitioner, Maynard brought this action by an Amended Complaint containing two counts. Count I alleged violations of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, the Safety Appliance Act, 45 U.S.C. §§ 1-16, and the Boiler Inspection Act, 45 U.S.C. § 23, resulting in injuries that he sustained while employed by the Respondent, Norfolk and Western, at Richlands, Virginia on November 1, 1990. Count II alleged violations of the Federal Employers' Liability Act resulting in injuries during the period from November 2, 1990 to November 13, 1990.

Jurisdiction in the United States District Court for the Western District of Virginia at Abingdon was based on 45 U.S.C. § 56 and 28 U.S.C. § 1331.

On December 3, 1994, Maynard filed a

Motion for Summary Judgment and Brief in Support on the issue of Norfolk and Western's liability in Count I under the Boiler Inspection Act.

Maynard submitted facts in support of his Motion for Summary Judgment which showed that on November 1, 1990, he was employed by Norfolk and Western as a locomotive engineer and, after reporting to work, he went to his assigned engine, Norfolk and Western 3218, and attempted to enter the locomotive cab through the door on the short hood end of the locomotive. When Maynard tried to pull the door open, he injured his left arm. He found that the door was jammed beyond its usual position and was dented. Maynard's supervisor, two carmen, and a flagman inspected the door after Maynard's accident and found that the door would not operate properly. They also

found that the door was jammed, that it was not usable, that the gasket around the door was cracked and badly worn, and that it had to be taken out of service because they were afraid someone would get hurt. Maynard's supervisor agreed that the door was part of the engine.

Maynard argued that there was no testimony or evidence that would indicate that the door to engine 3218 was functioning properly. Maynard further argued that the door was a part and/or an appurtenance of the engine and requested that the District Court grant summary judgment on his Boiler Inspection Act claim because there was no dispute that the defective door caused him injury.

On December 22, 1993, Norfolk and Western filed a Motion for Partial Summary Judgment and Memorandum in Support on the

issue of liability on Count I under the Boiler Inspection Act. Norfolk and Western also asked the District Court to deny Maynard's Motion for Summary Judgment. In its Motion Norfolk and Western first raised the issue of whether engine 3218 was in use or was being permitted to be used in its line at the time of Maynard's injury for purposes of coverage by the Boiler Inspection Act.

Norfolk and Western offered an affidavit stating that:

"it was the duty of an engineer such as Maynard to make a general inspection of his engine before leaving Richlands yard." (App. 24) Based upon this statement, Norfolk and Western argued that because the unit supposedly had to be inspected by Maynard before he left Richlands and because he had not done so before he was

injured, the engine was not "in use" on its line and was therefore excluded from coverage by the Boiler Inspection Act. (App. 37) Norfolk and Western also stated that on the morning of November 1, 1990, its engine was "parked" on the spark track in the yard at Richlands, Virginia and because engine 3218 was not moving interstate or foreign commerce, it was not "in use" on Norfolk and Western's line. (App. 36-37) Norfolk and Western also argued that there was a jury question as to whether the door was unsafe.

On December 30, 1994, Maynard filed his response to Norfolk and Western's Motion for Partial Summary Judgment and submitted additional facts which showed that the spark track at Richlands, Virginia was not a part of a maintenance facility and was not used for service, repair and/or

inspections of engines by car inspectors or carmen. Maynard stated that there were no service or repair facilities in Richlands, Virginia and that engines like the one he was assigned to operate were inspected, repaired and readied for use in Bluefield, West Virginia and were then brought to Richlands, Virginia and other locations for active service. Maynard testified that he was assigned to take his engine to meet a train in Cedar Bluff, Virginia and push that train consisting of engines and empty coal cars over a mountain so that the train crew could deliver the empty coal cars to a mine in Wyatt, West Virginia.

Maynard testified that he entered the engine door to start the engine and had no other engine available for his tour of duty. He turned in ME-60 reports regarding the condition of his engine after the

completion of each trip.

Maynard argued that the Fourth Circuit in Angell v. Chesapeake and Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980), ruled that an engine was "in use" for purposes of the Boiler Inspection Act when it had been "readied" through inspection, servicing and repair at a maintenance facility and "okayed" or released by railroad officials for active service. Maynard argued that his engine had been released from Bluefield, West Virginia and delivered to Richlands, Virginia for use by engineers and as such, it was "in use" or was being permitted to be used on Norfolk and Western's line for purposes of the Boiler Inspection Act. Maynard further argued that Norfolk and Western had failed to provide the District Court with specific facts which showed that the engine door was

not "unsafe". (App. 38-50)

On January 5, 1994, the District Court entered an Order and Memorandum Opinion which granted Norfolk and Western's Motion for Partial Summary Judgment as to Maynard's claim based upon the Boiler Inspection Act, and denied Maynard's Motion for Summary Judgment. (App. 1-15)

On the second day of the trial of this case, January 6, 1994, Maynard noted his objection to the District Court's ruling regarding his Boiler Inspection Act claim. (App. 50-52)

This case was tried before a jury on January 5, 6, and 7, 1994. The evidence at trial was that there were no repair facilities at Richlands, Virginia and that engines were repaired in Bluefield, West Virginia and Roanoke, Virginia. When repairs to engines were complete, train

crews took the engines to Richlands and other locations for active service. (App. 54,63) Maynard described the spark track as a holding track for engines and testified that there were no carmen assigned to do repair work at Richlands. There were no other engines located in Richlands, Virginia when Maynard reported for duty. (App. 63)

Maynard testified that he always reached for the engine door when moving an engine and intended to enter the engine to start the engine, to get the air brakes working and turn the lights on. (App. 64) Maynard described how he was injured when he attempted to open the door. (App. 64-65) He and other railroad employees described the defective condition of the door. (App. 67-76) Testimony showed that the door was taken out of service so that

no one could use it and because it was not working properly. (App. 69-71)

Maynard testified that he filled out an ME-60 form to report the condition of the engine after his tour of duty was completed. He reported the defective condition of the door while he was returning to Richlands. (App. 75) He did not leave the engine when he discovered the defective door because there were no repair facilities or carmen in Richlands and because he had received a signal from the dispatcher to leave the spark track and go to Cedar Bluff to meet the train that he was pushing to Wyatt, West Virginia. (App. 74-75)

Ben Burnette, a Norfolk and Western engineer, testified that he operated engine 3218 on the day before Maynard's accident. Burnette testified that he had difficulty

opening the short hood door and reported the defective condition of the door on an ME-60 form which he turned in after his trip. (App. 53-61)

Maynard's treating physicians testified that the injury to his left arm was caused by his pulling on the defective door.

On January 7, 1994, Maynard renewed his Motion for Summary Judgment on the issue of Norfolk and Western's liability under the Boiler Inspection Act. The District Court denied his motion. (App. 50-52)

On January 7, 1994, the jury returned a verdict for Norfolk and Western on Counts I and II of the Amended Complaint. (App. 16-17) On January 10, 1994, the District Court entered Judgment in favor of Norfolk and Western. (App. 18)

On January 20, 1994, Maynard filed a Motion to Set Aside Verdict and to Grant a New Trial and Brief in Support pursuant to Rule 59 of the Federal Rules of Appellate Procedure. Maynard requested that the District Court reconsider its rulings with respect to the Boiler Inspection Act set aside the jury verdict with respect to Counts I and II of the Complaint and order a new trial whereby Maynard would be allowed to pursue his claim under the Boiler Inspection Act and the Federal Employers' Liability Act.

Maynard relied upon the Fourth Circuit's rulings in Angell and noticed that in Angell, the Fourth Circuit warned against excluding from coverage under the Boiler Inspection Act any activity occurring between servicing and preparing the engine at a maintenance facility up

until the time the engineer takes the controls. Maynard argued that the District Court committed error in excluding him from coverage under the Boiler Inspection Act because he had been injured after the engine had been serviced at a maintenance facility and when he was attempting to take the controls of a "readied" engine. (App. 77-82)

Norfolk and Western filed its Memorandum in Opposition to Maynard's Motion to Set Aside the Verdict on February 8, 1994. (App. 83-86) On February 8, 1994, the District Court denied Maynard's Motion to Set Aside the Verdict and to Grant a New Trial and ordered that this matter be stricken from the docket, thereby entering judgment in favor of Norfolk and Western. (App. 19) Maynard timely filed and served his Notice of Appeal on February

18, 1994. (App. 20-21) Jurisdiction of the United States Court of Appeal for the Fourth Circuit was found in 28 U.S.C. § 1291 and § 1294 and the Federal Rules of Appellate Procedure 3 and 4.

On August 10, 1994, Maynard filed his Brief of Appellant with the United States Court of Appeals for the Fourth Circuit. He argued that the District Court committed a reversible error of law when it ruled that Norfolk and Western's Engine 3218 was not "in use" on Norfolk and Western's line at the time of Maynard's injury and thereby improperly denied his Motion for Summary Judgment and improperly granted Norfolk and Western's Motion for Partial Summary Judgment with respect to Maynard's Boiler Inspection Act claim.

On September 22, 1994, Norfolk and Western filed its Brief of Appellee with

the United States Court of Appeals for the Fourth Circuit.

On October 11, 1994, Maynard filed his Reply Brief with the United States Court of Appeals for the Fourth Circuit.

Following oral argument on February 1, 1995, the United States Court of Appeals for the Fourth Circuit entered judgment in the form of an unpublished per curiam opinion on March 27, 1995. The Fourth Circuit opined that because Maynard had not inspected the locomotive, had not filled out his inspection report, and had not put the locomotive in use, the Boiler Inspection Act had not yet become applicable. The Fourth Circuit did not state how the locomotive had not been put in use. (App. 23-28)

Maynard now brings this Petition for Writ of Certiorari and respectfully

requests that this court review the Fourth Circuit's rulings regarding his Boiler Inspection Act claim.

ARGUMENT

I. Whether a railroad's locomotive has been put in use or is being permitted to be used on the railroad's line for purposes of the Boiler Inspection Act when it has been inspected, repaired and serviced at a maintenance facility and has been released from that facility and delivered to a railroad yard and is being used by employees engaged in or connected with the movement of that engine?

The decision of the United States Court of Appeals for the Fourth Circuit with respect to James B. Maynard's Boiler Inspection Act claim is inconsistent with its prior rulings in Angell v. Chesapeake and Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980) and conflicts with opinions of other United States Courts of Appeals and opinions of this Court which interpret the Boiler Inspection Act. Further, the Fourth Circuit's holding in this case excludes from coverage the very employee that the Boiler Inspection Act seeks to protect, a locomotive engineer. As such the Fourth

Circuit's rulings in this case raise a question of federal law which should be settled by this Court.

When the Boiler Inspection Act was enacted, its stated purpose was:

> To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto. (emphasis added)

Employees were defined as:

> ...persons actually engaged in or connected with the movement of any train. (emphasis added)

Further, the Act provided that:

> ...it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive in moving interstate or foreign traffic...unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such

> carrier in moving traffic without unnecessary peril to life or limb... (emphasis added)

February 17, 1911, ch. 103, 36 Stat. 913.

By this language Congress intended to protect locomotive engineers like Maynard who are engaged in or connected with the movement of engines and trains for Norfolk and Western.

This Court has recognized that Congress intended for the Boiler Inspection Act to protect employees who may be injured by defective engines which are placed in active service by the railroad. In Brady v. Terminal R.R. Assn., 303 U.S. 10 (1938), this Court ruled that an engine temporarily placed on a receiving track away from a place of repair was "in use" for purposes of the Safety Appliance Act, despite the fact that the employee was injured while he was inspecting a car. This Court stated:

> As we said in Louisville and Nashville R. Co. v. Layton, supra, the liability 'springs from its being made unlawful to use cars not equiped as required, - not from the position the employee may be in, or the work which he may be doing at the moment when he was injured...

Brady, 303 U.S. at 16.

Although the Brady decision dealt with application of the Safety Appliance Act, cases defining and interpreting the phrase "in use" for purposes of the Safety Appliance Act are authoritative for the same purpose under the Boiler Inspection Act. See Lyle v. Atchison, Topeka, & Santa Fe Ry. Co., 177 F.2d 221 (7th Cir. 1949), cert. denied, 339 U.S. 913 (1950).

This Court refused to focus on the actions of railroad employees to deny them coverage under the Safety Appliance Act. This decision reiterates the fact

that the Safety Appliance Act and the Boiler Inspection Act were meant to protect employees of the railroads. Liability under the Boiler Inspection Act "springs" from the fact that a railroad and its employees have put a piece of equipment in active service and not from the activity of the employee who is injured while using that defective equipment.

The Fourth Circuit's decision in Angell delineated at what point an engine is put "in use" for purposes of the Boiler Inspection Act. Kenneth Angell was a machinist who was injured when he was uncoupling two engines. The air brake valve on the engine was defective and when Angell turned the valve a blast of high pressure air injured his right ear. Earlier that day, the engine had

been sanded, fueled and inspected by mechanical department employees. When Angell was injured, all servicing, maintenance and inspection work had been completed at the repair facility. The locomotive was not moving at the time Angell was injured. He was helping to prepare it to be moved to a nearby track to pull a train a few hours later.

The Fourth Circuit's decision focused on whether Angell's engine was "in use" or was being "permitted to be used" on the railroad's line for purposes of coverage by the Boiler Inspection Act. The Fourth Circuit held that although "Congressional intent and case law construing the statute clearly exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment <u>located at a</u>

maintenance facility...," Angell's injuries warranted coverage by the Boiler Inspection Act because his accident occurred "after these excluded activities had been performed and during the uncoupling of a "readied" engine..." Angell, 618 F.2d at 262. (emphasis added)

Although Angell's employer tried to argue that railroad officials did not consider that the engine was "in use" until it was "okayed" by the mechanical department and a crew had been "called", the Fourth Circuit warned against excluding "those activities occurring between servicing and preparing the engine up until the time the engineer takes the controls."

Angell, 618 F.2d at 262.

By excluding only those employees who performed inspections, repairs, and

servicing at a maintenance facility from coverage by the Act, the Fourth Circuit in Angell upheld Congress' stated intention to protect railroad engineers like James Mayanrd who were "engaged in or connected with the movement of any train."

On November 1, 1990, Maynard had been called and assigned by railroad officials to operate engine 3218 to pull other engines and empty hopper cars over a mountain so that that train could deliver the cars to a mine in Wyatt, West Virginia. Maynard was attempting to open the door to start his engine when he was injured. He was not servicing or inspecting the door. Rather, he was performing an act which was necessary for him to move the train and perform his assigned duties.

Maynard's engine had already been placed in active service because it had been inspected, serviced and repaired in Bluefield, West Virginia or Roanoke, Virginia and delivered to Richlands, Virginia before Maynard's injury. Another engineer, Ben Burnette had already used the engine on the day before Maynard's accident.

The Fourth Circuit's rulings exclude Maynard from the protection which Congress intended. The Fourth Circuit has now redefined when an engine is put in use or is being permitted to be used by a railroad on its line for purposes of the Boiler Inspection Act. The rationale utilized is that Maynard had not inspected the engine and had not completed an inspection report before he was injured. This ruling contravenes the

intent of the Act to include, rather than exclude, railroad employees from coverage.

The Fourth Circuit cited Pinkham v. Maine Central R. R. Co., 874 F.2d 875 (1st Cir. 1989) as authority for its opinion that the Boiler Inspection Act had not yet become applicable to Maynard because he had not placed his engine in use by completing his inspection. Edward Pinkham was an employee hired by Maine Central to perform electrical maintenance on locomotives. Pinkham was injured while he was working on an engine which was undergoing testing and which was located at a repair facility in Portland, Maine. The First Circuit ruled that Pinkham's engine was not "in use" when he was injured because "locomotives being serviced in a place of repair are not 'in

use' within the meaning of the Boiler Inspection Act." Pinkham, 874 F.2d at 881-882. The First Circuit cited cases, including Estes v. Southern Pacific Transp. Co., 598 F.2d 1195 (10th Cir. 1979) and Angell as supporting authority.

Pinkham and Angell stand for the proposition that activities including inspection, repair and servicing of locomotives or engines at maintenance facilities are excluded from coverage by the Boiler Inspection Act. The exclusion which is provided for in these decisions should be read narrowly as the Boiler Inspection Act intends that engineers like Maynard be protected once their engines are released from a maintenance facility and placed into active service by the railroads.

The Fourth Circuit also cited

Trinidad v. Southern Pacific Transportation Co., 949 F.2d 187 (5th Cir. 1991), as authority for its opinion that Boiler Inspection Act coverage had not yet become applicable to Maynard. Trinidad was a carman who was injured after he had discovered and repaired an air leak in the brake system of a tank car.

The Fifth Circuit ruled that the inspection of the brake system was technically not complete because Trinidad had not reported his findings to the engineer and as such the train was not "in use" when Trinidad was injured. Trinidad, 949 F.2d at 189.

The Trinidad decision is not proper authority for this case. Maynard was an engineer specifically afforded protection by the Boiler Inspection Act because he

was an employee who had been called by his supervisors to assist the movement of a coal train so that it could deliver empty coal cars to a coal mine. He was engaged in an activity directly related to moving that train when he was injured.

Maynard had a duty to perform a general inspection of his engine but this was incidental to his operation of the engine. In fact, he was required to turn in his inspection report after his run and not before. When Maynard attempted to enter the engine door, he intended on starting his engine and leaving Richlands. The engine was already in use when Maynard boarded the engine. He was under no obligation to report the condition of the engine until.

The District Court and the Fourth Circuit have ignored Maynard's testimony

and have chosen to accept Norfolk and Western's claim that Maynard had to report the condition of his engine before leaving Richlands. The District Court and the Fourth Circuit have found that because this inspection was not completed when Maynard was injured, the engine had not been put "in use".

The District Court and the Fourth Circuit have also ignored the testimony of Ben Burnette. Burnette testified that he operated the engine the day before Maynard's accident and could not open the door. Burnette testified that he reported the condition of the door in his inspection report which was turned in <u>after</u> his run. The Boiler Inspection Act violation which ultimately caused Maynard's injury existed the day before Maynard's injury and the engine was

allowed to remain in use until Maynard was injured.

It is clear from Maynard's and Burnette's testimony that their duty to perform a general inspection of their engines had no bearing on whether their engine was "ready" or "in use." As such, the Trinidad case has no application to the facts in this case.

The Fourth Circuit also relied upon the fact that Maynard's engine was dormant and had not been connected to any cars when he was injured. However, this Court has ruled that a car is "in use" despite the fact that it is motionless. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Goneau, 269 U.S. 406, 409 (1926), and the Second Circuit in Holfester v. Long Island Railroad Co., 360 F.2d 369 (2nd Cir. 1966), held that

an engine which is temporarily removed from a main line away from a place of repair remains "in use" for purposes of the Boiler Inspection Act. The Second Circuit relied on this Court's decisions in Brady and Goneau in giving a broad application of the Act. Holfester, 360 F.2d at 372, 373.

These decisions show that Congress intended to protect employees engaged in moving engines and cars once those pieces of equipment were placed in service. Congress and this Court have recognized that employees may be injured by defective equipment despite the fact that it is standing still. Again, liability under the Act springs from the fact that the railroad places defective equipment in service.

The Fourth Circuit's reliance on

Estes v. Southern Pacific Transportation Co., 598 F.2d 1195 (10th Cir. 1979), for the requirement that an engine must be moving or moving interstate or foreign commerce to be "in use" is inappropriate. Angell declined to rely upon Estes because the question of whether an engine was moving interstate or foreign commerce when an employee was injured was not dispositive of the question as to when an engine had been "readied" and "okayed" for active service by a railroad. See Angell, 618 F.2d at 262. Estes more accurately stands for the same proposition that Angell stands for, that is, that an engine which has not been released from a servicing facility is not "readied" and "okayed" for service by a railroad.

Estes was injured when he was

boarding an engine which was housed in a round house area on a track which was used for servicing. There was no evidence that the engine had been released from that facility for active service. Again, the focus of the Tenth Circuit's analysis was whether the engine had been released from a repair facility so that engine could be considered "in use". This analysis keeps with Congress' intent to protect the employee once the engine is placed in use.

The need for this Court to review the Fourth Circuit's decision is shown by a recent decision of the United States District Court for Colorado. In Rivera v. Union Pacific R. Co., 868 F.Supp. 294 (D. Colo. 1994), Rivera was an engineer who slipped and fell on an automatic brake valve handle as he walked through

an engine cab after he had looked at the control panel to ensure that the hand brakes were released and the engines were in a "run" position. Rivera's employer argued that the engine was not in use because he was performing an "inspection" and because the engine was not moving interstate or foreign commerce at the time Rivera was injured.

The District Court in Rivera ruled that Rivera's engine was in use because Estes and this Court's decision in Goneau did not require that an engine be moving or engaged in moving interstate a foreign commence to be in use for purposes of the Boiler Inspection Act. Rivera 868 F. Supp. at 300.

The District Court in Rivera also found, in accordance with Angell, that Rivera's engine had been readied for use

because it had been released from a maintenance facility and because his act of looking at the panel was not an act of inspection to discover defects but an act incident to his task of operating the train. Rivera 868 F.Supp. at 300. This is exactly the same situation posited by the instant case.

If the Fourth Circuit's ruling in this case is allowed to stand, engineers like Rivera and Maynard will have no protection under the Boiler Inspection Act unless an engine is moving along a mainline.

The Fourth Circuit's decision in this case conflicts with its previous decision in Angell and conflicts with the rulings of this Court and those of other United States Courts of Appeals which properly apply the Boiler Inspection Act.

The Fourth Circuit's opinion in this case excludes from coverage the very employee that the Act seeks to protect, a locomotive engineer who was engaged in moving his engine.

CONCLUSION

The evidence which was presented to the District Court and the Fourth Circuit on motion and during the trial of this case showed that James B. Maynard was injured on an engine which had been inspected, serviced, and repaired at a maintenance facility or "readied"; released by Norfolk and Western's officials for active service; and delivered Norfolk and Western's yard in Richlands, Virginia for use by employees engaged in or connected with the movement of that engine.

Given the Fourth Circuit's ruling in

Angell, and further, given decisions rendered by this Court and those of other United States Courts of Appeal, Norfolk and Western engine 3218 was "in use" or was being "permitted to be used on its line" for purposes of the Boiler Inspection Act. James B. Maynard should be afforded the coverage that Congress intended in enacting the Boiler Inspection Act.

The Fourth Circuit's opinion in this case conflicts with its previous decision in Angell and conflicts with decisions of this Court and other United States Courts of Appeal on this important question of federal law. Accordingly, James B. Maynard's Petition for Writ of Certiorari should be granted and ultimately the rulings of the District Court and the Fourth Circuit with respect to his Boiler

Inspection Act claim should be reversed and a new trail should be ordered.

Respectfully submitted,

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(2)

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD
Plaintiff,
v. CIVIL ACTION NO. 92-0163-A
NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant.

MEMORANDUM OPINION

This federal questions case is before the Court on crossmotions for partial summary judgment. Having reviewed the briefs submitted by both parties to the action, this Court considers these motions ripe for decision. Jurisdiction to decide this matter rested with the Court under 28 U.S.C. 1331.

FACTS

On November 1, 1990, the plaintiff, James Maynard ("Maynard"), reported to his job as a locomotive engineer with the defendant, Norfolk and Western Railway

Company ("N&W") at the defendant's Richlands rail yard. Maynard went to his assigned engine and attempted to enter the cab through a door on the short hood end. Maynard was unable to open the door and was injured in his attempt to open it. Maynard then proceeded to the other side of the engine where he entered the cab through the door on the long hood end.

Once in the cab, Maynard inspected the short end door and determined that it was stuck due to a faulty door sealing gasket. The engine was subsequently removed from service due to the faulty door. Maynard brought suit against N&W claiming damages resulting from violations of the Federal Employers' Liability Act, the Safety Appliance Act, and Boiler Inspection Act.

Maynard then filed a motion for summary judgment on the basis of his claim

under the Boiler Inspection Act. Plaintiff claims there is no material factual dispute over the fact that the door on the short hood end was damaged and "unsafe". Maynard claims this fact entitles him to summary judgment on the issue of defendant's liability.

N&W responded by filing a motion for partial summary judgment based on the Safety Appliance Act and the Boiler Inspection Act. Defendant maintains that the plaintiff is not entitled to summary judgment on his Boiler Inspection Act claim since the locomotive was not "in use on its line". [1] Defendant further claims that since

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1 § 23 Use of unsafe locomotives and appurtenances unlawful; inspection and tests
It shall be unlawful for any carrier to use or permit to be used on its line by locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in service to which the same are put, that those may be employed in the active service of such carrier without peril to life or limb, and unless said

the locomotive was not "in use on its line", there can be no violation of the Boiler Inspection Act, and therefore, N&W is entitled to summary judgment on the Boiler Inspection Act claim. Defendant also asserts that the Safety Appliance Act does not apply to doors on rail cars or engines and summary judgment should be granted to the defendant on that claim.

Maynard responded to defendant's motion by indicating a desire to forego prosecution of the Safety Appliance Act claim, but maintaining that the Boiler Inspection Act claim entitles him to relief. Plaintiff claims the engine was "in use on its line" at t he time of the

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locomotive, its boiler, tender, and all parts appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such tests as may be prescribed in the rules and regulations hereinafter provided for.

injury and that the door was "unsafe".

DISCUSSION

In its motion for summary judgment the moving party has the initial burden of coming forward and identifying which "pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any," demonstrate that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once this initial burden is satisfied, the non-moving party must"go beyond the pleadings" and demonstrate the specific facts that show "there is a genuine issue for trial." Id. at 324. If, upon evidence presented to the court, there is no genuine issue of material fact in dispute, the moving party is entitled to judgment as a matter of law. Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

A. Safety Appliance Act

This Court finds itself in an unusual situation with regards to plaintiff's Safety Appliance Act claim. There is a motion by the defendant for summary judgment on the issue, but plaintiff has indicated that he "does not intend to pursue a Safety Appliance Act claim." *Plaintiff's Response to Defendant's Motion for Partial Summary Judgment* at 5. The Court does not view this statement as a motion to dismiss the claim, but in the event it is so intended, the plaintiff's claim based upon the Safety Appliance Act is dismissed with prejudice.

If the statement was not intended as a request for dismissal of the claim, this Court finds the defendant's position to be

persuasive on this issue. More specifically, defendant cites Jordan v. Southern Ry. Co., 970 F.2d 1350 (4th Cir. 1992), where the Court held that a door and its ratchet mechanism is not a "safety appliance" within the meaning of the Safety Appliance Act. Id. at 1351. In light of this binding authority, this Court grants N&W's motion for summary judgment as to Maynard's Safety Appliance Act claim.

b. Boiler Inspection Act

The only true issue before this Court is whether summary judgment should be granted on the Boiler Inspection Act claim. In deciding this motion the Court is faced with the central question of whether the locomotive, on which Maynard was injured, was in "use on its line" within the meaning of the Boiler Inspection Act, 45 U.S.C. 23. Because this Court finds that the

locomotive was not 'in use" within the meaning of the Act and grants summary judgment to the defendant, it is unnecessary to evaluate plaintiff's claim that the door was "unsafe".

In its motion for summary judgment the defendant asserts that because the engine was located on a side track and had not been inspected it was not"in use" at t he time of Maynard's injury. Defendant relies heavily on the reasoning in Angell v. Chesapeake & O. Ry. Co., 618 F.2d 260 (4th Cir. 1980) where the Court based its holding that the engine was "in use" on the fact that the injury occurred after the engine had been inspected and was "readied". Id. at 262. Defendant, in this case, further argues, that since the engine was cold and had not been inspected, the engine was not "readied," and therefore,

was not "in use".

Plaintiff responds that the engine had been inspected and was ready for use and that Maynard's injury occurred when he was simply trying to enter the engine, not while he was inspecting it. since, according to the plaintiff, the engine was ready for use, it was "in use" within the meaning of the Act.

As a starting point for this inquiry, the Court must decide what the uncontested facts are in this case. It is apparent that the engine which Maynard mounted was sitting on a side track and was cold. Maynard was responsible for conducting an inspection of the engine prior to taking the engine from the rail yard. At the time of his injury, Maynard has not conducted his inspection of the engine. While there are other undisputed facts surrounding the

accident, these facts are the most relevant to a resolution of this matter.

The bulk of the case law on this issue consistently holds that when an engine is undergoing repairs, servicing, or inspection, it is not "in use" and is not subject to the Boiler Inspection Act. See Angell v. Chesapeake and O. Ry. Co., 618 F.2d 260 (4th Cir. 1980); Trinidad v. Southern Pacific Transp. Co., 949 F. 2d 187 (5th Cir. 1991); Tisneros v. Chicago and N. W. Ry. Co., 197 F. 2d 466 (7th Cir. 1952). Plaintiff makes a valiant effort to distinguish his factual situation by claiming that since there are not repair or maintenance facilities at the Richlands rail yard, the engine could not be inspected, repaired, or maintained there. Maynard also claims that his injury did not result from his "inspection" of the door

but rather from his opening it.

The Court find these distinctions to be unpersuasive. It is undisputed that Maynard bore the responsibility of inspecting the engine before leaving the yard. Were Maynard to have discovered some defect in the engine prior to leaving, it would be his responsibility to report it to the proper personnel before continuing. Such is the case here. It cannot be said that the engine was "readied" prior to Mayanrd's inspection. If in fact, it was considered "readied" there would be no need for plaintiff to conduct the inspection. In fact if an inspection had been conducted, it would likely have revealed the condition of the door.

Plaintiff argues that he was not conducting an inspection and there after the engine was "in use" before he boarded.

However, there appears to be no case law which supports this position. While an engine need not be in motion to be "in use", it generally must be en route to its destination. See New York, H. H. & H. Ry. v. Leary, 204 F.2d 461, 465 (1st Cir.), cert. denied, 346 U.S. 856 (1953). Accepting plaintiff's rationale, any time an engine were away from a repair facility, even though sitting cold on a side track, would be "in use." Such is clearly not the case. Plaintiff's act of trying to open the door did not place the engine "in use" for purposes of the Boiler Inspection Act. Accordingly, summary judgment is granted to the defendant.

CONCLUSION

Pursuant to the reasoning outlined advice, this Court concludes that the Safety Appliance Act does not apply to

doors or injuries resulting from their use. This Court also finds that the engine was not "in use" within the meaning of the Boiler Inspection Act at the time plaintiff's injury occurred, and therefore, the Boiler Inspection Act is inapplicable in this case. Accordingly, summary judgment is granted in favor of the defendant on both claims.

ENTER: This _____ day of January, 1994.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD

Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

ORDER

For the reasons set forth in the Memorandum Opinion filed this day, it is hereby

ADJUDGED AND ORDERED

that:

1) The plaintiff's claim based upon the Safety Appliance Act is hereby DISMISSED WITH PREJUDICE;

2) Defendant Norfolk and Western Railway Company's Motion for Summary Judgment, as to the Safety Appliance Act, and the Boiler Inspection Act is hereby

GRANTED;

3) Plaintiff's Motion for Summary Judgment is DENIED.

The Clerk is directed to send certified copies of this judgment and order to counsel of record.

ENTER: This _____ day of January, 1994.

_____
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD

V.

NORFOLK & WESTERN RAILWAY COMPANY

CASE NUMBER: 92-0163-A

(1) Was the defendant, Norfolk & Western, guilty of negligence which was a proximate case of the plaintiff's injuries, in whole or in part?

_____ or __X__
Yes No

If your answer is "NO", this is the end of your verdict. If your answer is "YES", proceed with the next question.

(2) Was the plaintiff guilty of some contributory negligence?

_____ or _____
Yes NO

If your answer is "NO", proceed to question #4; if your answer is"YES", answer questions #3 and #4.

(3) What percentage of plaintiff's injuries was caused by his own negligence?

_____%

(4) Disregarding any percentage in questions #3, if any, or any reduction due to contributory negligence, what are the total damages sustained by the plaintiff as a result of defendant' negligence?

$_____

_____ _____

FOREPERSON'S SIGNATURE DATE

UNITES STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES MAYNARD

V.

NORFOLK & WESTERN

CASE NO: 92-0163-A

__X__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tired and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff shall recover nothing from the defendant and judgement is entered in favor of the defendant and this case is stricken from the docket.

_____ _____
Date U.S. District Judge

_____
(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,
Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILROAD COMPANY,
Defendant.

ORDER

For the reasons announced from the bench and in light of the unanimous defense verdict delivered by a fair and impartial jury this Court finds the plaintiff's motion to set aside the verdict and for a new trial to be without merit. Accordingly, the motion is DENIED.

The Clerk is ordered to strike this matter from the docket and send copies of this order to all counsel of record.

ENTERED: this 8 day of February, 1994

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,

Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that plaintiff, above named, hereby appeals to the United States Court of Appeals for the Court Circuit from Order by the Honorable Glen M. Williams denying plaintiff's Motion to set Aside the Verdict and to Grant a New Trial and entering judgment for defendant on plaintiff's claim under the Federal Employers' Liability Act, entered in this action on the 8th day of February, 1994.

JAMES MAYNARD

By: _____
Of Counsel

Otis K. Forbes, III, Esquire
Francis P. Hajek, Esquire
WILSON & HAJEK, P.C.
1294 Diamond Springs Road
Post Office Box 5369
Virginia Beach, Virginia 23455

CERTIFICATE

I hereby certify that a true copy of the aforesaid Notice of Appeal was mailed to all counsel of records this 18th day of February, 1994.

Otis K. Forbes, III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,
Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILROAD COMPANY,
Defendant.

AFFIDAVIT

I, F. R. Stepp, make the following affidavit based upon my personal knowledge and certify that I am competent to testify to the matters stated herein:

1. On November 1, 1990, I was the general yardmaster for Norfolk and Western Railway company at its Richlands, Virginia, yard. I was also one of James B. Maynard's supervisors on that date.

2. Mr. Maynard alleges an injury on the morning of November 1, 1990, at or about 2:15 a.m. At that time, Mr. Mayanrd states that he reported to work and his

assigned engine was parked by itself on the spark track of Norfolk and Western's Richlands, Virginia yard.

3. The spark track at the Richlands yard is a track designated to park locomotives on when not in use. I understand that the name originated from the days of the steam engines when there was coal-fired furnace on the engine to produce steam. The steam locomotives were brought into the terminal after a run and were parked on the spark track to shake the coal cinders out of the furnace. This process would cause sparks, and thus the track became know as a spark track. The spark track is also known as an eigne track. When the unit is on the spark track or engine track it is off the main line and is not being used.

4. As part of the job, it is the duty

of an engineer, such as Mr. Mayanrd, to make a general inspection of his engine before leaving the Richlands yard. Mr. Maynard had such a duty on November 1, 1990, with respect to the engine in question for taking it form the spark track.

F. R. Stepp

STATE OF VIRGINIA

COUNTY OF TAZEWELL

Subscribed and sworn to before me this 22nd day of December , 12993, by F. R. Stepp.

Notary Public

My Commission Expires:

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES B. MAYNARD,

Plaintiff-Appellant,

v. No. 94-1285

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon.

Glen M. Williams, Senior District Judge.
(CA-92-163-A)

Argued: February 1, 1995

Decided: March 27, 1995

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and YOUNG Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Francis Paul Hajek, WILSON & HAJEK, P.C., Virginia Beach, Virginia, for Appellant. Richard Edward Ladd, Jr., PENN,

STUART, ESKRIDGE & JONES, Abingdon, Virginia, for appellee.
ON BRIEF: Otis K. Forbes, III, WILSON & HAJEK, P.C., Virginia Beach, Virginia, for Appellant. Wade W. Massie, PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

James B. Mayanrd, a locomotive engineer, strained his left elbow on November 1, 1990, when he tried unsuccessfully to open a stuck cab door to Locomotive 3218, owned by his employer, Norfolk and Western Railway Company. The injury occurred at the beginning of Maynard's work day when Maynard tried to enter the cab of the locomotive, which was parked on a side track. He sustained further injury during the two weeks after his elbow injury when he returned to work and strained his neck and shoulder from climbing onto locomotives while his left elbow was in a sling. Mayanrd sued Norfolk and Western for damages under the Boiler Inspection Act, 45 U.S.C. § 23, * and under the Federal Employer Liability Act (FELA), 45 U.S.C. § 51. The district court dismissed the Boiler Inspection Act claim on Norfolk and Western's motion for summary judgment because the locomotive was not "in

use" when Mayanrd hut his elbow. Following a jury trial on the FELA claim, the jury rendered a verdict in favor of Norfolk and Western. Maynard contends that the district court erred both in ruling as a matter of law that the locomotive was not in use and in instructing the jury on the FELA claim. He also contends the jury's verdict was against the weight of the evidence. We disagree and accordingly affirm.

The Boiler Inspection Act provided at the time of this incident:

> It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to lee or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test of tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. § 23 (emphasis added). The

Act does not impose liability on a railroad for locomotives in repair or not in use. See Angell v. Chesapeake & Ohio Ry. Co., 618 F.2d 260, 261 (4th Cir. 1980). In this case, Mayanrd had a duty to inspect the locomotive for any defects, which must be noted on Norfolk and Western's ME-60 form, as well as a duty to assure that any unsafe condition is corrected as well as a duty to assure that any unsafe condition is corrected before putting the locomotive in use. Maynard injured himself before he had even entered the cab of the locomotive. At that time, the locomotive was parked on a side track. dormant and unconnected to any cars. As Mayanrd climbed on to the locomotive, he tried to open the door to the cab with his right hand, unsuccessfully. He then tried with "full force" to open the door with his left hand, while bracing with his right hand, and strained his left elbow in the process. When that effort proved unsuccessful, Maynard went around and entered on the other side of the cab and then kicked open the stuck door from the inside. At the time of the incident the locomotive had not been inspected, the ME-60 form had not been filled out, and the locomotive had not been put into use. Accordingly, the strict liability of the Boiler Inspection Act had not yet become applicable. See Angell, 618 F.2d at 261-62 (train was in use when all servicing, maintenance, and repair work had been completed). See also Pinkham v. Main Cent. R.R. Co., 874 F.2d 875, 882 (1st Cir. 1989) (train not in use when en route for repairs); Estes v. Southern Pac. Transp. Co., 598 F.2d 1195, 1198-99 (10th Cir. 1991) (train was not in use for purposes of

Safety Appliance Act because the injury occurred during a predeparture brake inspection.)

On the FELA claim, Maynard contend that the district court erred in refusing to instruct the jury as he requested. While the court did not instruct the jury exactly as Mayanrd had requested, it adequately covered the subject matter in its own form of instructions. Maynard id not entitled to have his form of jury instruction given to the jury so long as the district court adequately instructed on the law with respect to the issues properly submitted to the jury. See e.g., Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072, 1076 (4th Cir. 1978) (Affirmance of the district court is required as long as the instructions, taken as a whole, fairly and adequately state the pertinent legal principles). Moreover, we note that several of the requested instructions related to damages were rendered moot by the jury's verdict for the defendant.

Finally, Maynard contends that the district court should have granted his motion for a new trial because the jury's verdict was against the clear weight of the evidence on Norfolk and Western's negligence in allowing Maynard to use a locomotive with a defective door and in allowing him to return to work with his elbow in a sling. We reject this contention. Nov evidence was presented showing prior knowledge by the railroad that the door was stuck, and Maynard's return to work was entirely voluntary, following advice from his personal doctor.

The district court acted well within its discretion in refusing to disturb the jury's verdict.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD

Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILROAD COMPANY

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

ARGUMENT

1. THERE WAS NO VIOLATION OF THE BOILER INSPECTION ACT BECAUSE THE NORFOLK AND WESTERN ENGINE WAS NOT "IN USE ON ITS LINE" AT THE TIME OF THE ACCIDENT.

The Boiler Inspection Act provides as follows:

> It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boilers, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to life or

> limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. 23.

In Estes v. Southern Pacific Transportation Co., 598 F.2d 1195 (10th Cir. 1979), the plaintiff was injured while attempting to move a locomotive from a service track. Specifically, Estes was pushing down on a door handle of the engine when he turned to look back over his left shoulder and injured his back. Estes could not remember where he had been told to move the locomotive, but evidence presented at trial established that the engine could have possibly been moved to the main line or moved out and tied into a run through train, among other destinations. A

roundhouse foreman testified that locomotives not scheduled to be held for repair were placed on the service tracks. Upon the facts presented, the District Court directed a verdict in favor of the defendant railroad on Estes' Boiler Inspection Act claim.

In affirming the decision of the trial court, the Tenth Circuit Court of Appeals addressed the question of whether the involved engine was being "used on its line" at the time of Estes' injury. The Court reviewed the legislative history of both the Safety Appliance Act and the Boiler Inspection Act, noting with interest the fact that Congress employed the words "used on its line" rather than using the words "interstate commerce" as it had done so in the Safety Appliance Act. the Court determined that "used on its line" under

the Boiler Inspection Act was intended to mean used in moving interstate or foreign traffic. Accordingly, the Tenth Circuit held that, at the time of the incident at issue, the locomotive unit was not engaged in moving interstate or foreign traffic and was, therefore, not in use on the railroad's line for purposes of the Boiler Inspection Act.

In 1980, the United States Court of Appeals for the Fourth Circuit described the argument made by the railroad in Estes as "persuasive." Angell v. Chesapeake and Ohio Railway Co., 618 F.2d 260 (4th Cir. 1980). Although the Fourth Circuit found the Boiler Inspection Act to apply in Angell, the facts are different from those of the present case.

In Angell, the plaintiff was helping switch engines when a blast of air from a

defective air brake valve damaged his right ear. The incident tool place after the locomotive in question had been serviced and was in the process of being moved along with another engine to a nearby track where they both would become part of a group of engines used to pull a train later that evening. Angell was uncoupling two engines and had just turned the air brake exhaust valve prior to separating the air hoses when eh was injured by the blast of air.

In distinguishing the cases cited by the railroad in support of its argument that the engine was not "in use on its line" (including the Estes case), the Court noted that all servicing, maintenance, and inspection work had already been performed and that the engine was in the process of being moved to its place in the "consist"

(group of engines). As stated by the Court:

> The present case involves an injury occurring after (inspection, repair, or servicing of railroad equipment located at a maintenance facility) have been performed and during the uncoupling of a "readied" engine in preparation for moving it to a nearby track to pull a train a few hours later. (Emphasis in the original.)

Angell, 618 F.2d at 262.

The Court stated further:

> Although the engine may not actually be engaged in moving interstate commerce, the intent of the statute is to exclude from its coverage only such functions as are necessary to detect and correct those defective conditions for which absolute immunity will be imposed.

Id.

The undisputed facts of the present case demonstrate that the involved locomotive was not being used to move interstate or foreign traffic at the time of the plaintiff's claimed injury on November 1, 1990. Rather, it was parked by

itself and idle on a spark track when the plaintiff tried to enter the unit and found the door was stuck. Under normal procedure, the unit was to be inspected by Maynard before being placed in use. (See Stepp affidavit.) Accordingly, at the time Maynard was injured, the locomotive was not "in use" on Norfolk and Western's line and was, therefore, outside the scope of the Boiler Inspection Act. Accordingly, the Court should grant summary judgment to Norfolk and Western on plaintiff's Boiler Inspection Act claim in Count I.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTER DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,

Plaintiff

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, by counsel, pursuant to Rule 56 of the Federal Rules of Civil Procedure, responds to Defendant's Motion for Partial Summary Judgment and submits the following facts and argument for the Court's consideration:

FACTS

On November 1, 1990, Plaintiff was employed by Defendant as a locomotive engineer. After reporting for work

Plaintiff went to his assigned engine at approximately 2:20 a.m., and attempted to enter the locomotive cab through the door on the short hood end. Plaintiff intended to start the engine after entering the door. (Plaintiff's deposition at p.15 and Plaintiff's Affidavit). The door would not open. (Plaintiff's deposition at 15). When Plaintiff tried to pull the door open, he was injured. Id. Plaintiff, his supervisor, and other Norfolk and Western employees examined the door thereafter and found that the door was bent and didn't fit like it was supposed to; that the gasket around the door was cracked and badly worn, which caused the door to wedge tight; that the door would not open properly; that it was not usable; and that it had to be taken out of service because it might hurt somebody. (Please see Plaintiff's Motion

for Summary Judgment and Brief in Support).

Plaintiff was assigned to take his engine to meet a train in Cedar Bluff, Virginia, and push the train consisting of engines and empty coal cars over a mountain so that the train crew could deliver the empty coal cars to a mine in Wyatt, West Virginia.

Plaintiff turned in ME-60 reports regarding the condition of the equipment on his engine after his tour of duty. (Plaintiff's deposition at p.28).

The spark track at Richlands, Virginia is not a part of a maintenance facility and is not used for service, repair and/or inspection of engines by car inspectors or carmen. There are no service or repair facilities in Richlands, Virginia. Engines are inspected, repaired and readied for use in Bluefield, West Virginia, and are then

brought to Richlands, Virginia and other location for their use. (Plaintiff's Affidavit).

On November 1, 1990, Plaintiff had no other engine to sue for his tour of duty. (Plaintiff's affidavit).

ARGUMENT

The Defendant has failed to show specific facts which would indicate that there is a genuine issue with respect to a material fact in this case, namely, whether the door to engine 3218 was defective and unsafe in violation of the Boiler Inspection Act and such violation resulted in injury to the Plaintiff.

1. Defendant cites Estes v. Southern Pacific Transportation Co., 598 F.2d 1195 (10th Cir, 1979) and Angell v. Chesapeake and Ohio Railway Co., 618 F.2d 260 (4th Cir., 1980) to support its argument that at

the time Plaintiff was injured, his locomotive was not "in use" on Norfolk and Western's line and was, therefore, outside of the scope of the Boiler Inspection Act.

The Court in Angell observed that Estes was not dispositive of the factual situation before it and as such, Estes is not applicable in this case. The Court, in Angell, recognized that the focus of its attention was not on whether the engine was actually engaged in moving interstate or foreign commerce at the time the plaintiff was injured, but whether plaintiff's injuries "directly resulted from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." Angell, 618 F.2d at 262 (emphasis added). The Court, in Angell, found that the Boiler Inspection Act applied where an injury occurred "after

these excluded activities had been performed and during the uncoupling of a 'readied' engine". Id.

Given the Court's rulings in Angell, it is clear that James Maynard's injury falls within the scope of the Boiler Inspection Act. On November 1, 1990, Mr. Maynard attempted to enter the cab of the engine to start his engine. Engine 3218 was an engine which was ready for service and was not housed at a maintenance facility. Engines such as 3218 are inspected, repaired and maintained in Bluefield, West Virginia, and are sent to locations such as Richlands, Virginia for use. Mr Maynard was injured after these activities had taken place and when he attempted to enter a readied engine.

James Maynard was not a car inspector or carman and he was not inspecting the

engine at a maintenance facility. When he was injured, Mr. Maynard was attempting to enter the engine to start the engine. He was not inspecting the door. Defendant has argued that Mr. Maynard had to make a general inspection of the engine prior to taking it out of the spark track. Although Plaintiff may have had this responsibility, his duties did not somehow make his act of opening the door an inspection. It is important to remember that Mr. Maynard turned in his ME-60 reports after his tour of duty, not before, and that there were no carmen or a maintenance facility at Richlands to make repairs.

2. Defendant has failed to provide this Court with specific facts which show that the engine door was not "unsafe." The facts as presented by Plaintiff in his Motion for Summary Judgment show that the

door was not functioning properly because it was damaged and defective, and that it had to be taken out of service because it might hurt somebody. There is no dispute about these facts. Defendant has not shown specific facts which would allow a reasonable jury to find otherwise. the fact that Plaintiff pulled on the door, rather than walking around to the other door does not erase the testimony which is already before the Court which clearly shows that the engine door was unsafe and defective in violation of Boiler Inspection Act and that such violation caused injury to the Plaintiff.

2. In response to Defendant's Motion for Summary Judgment, with respect to the Safety Appliance Act claim in Count I of his Complaint, Plaintiff states that he does intend to pursue a Safety Appliance

Act claim under Count I of his complaint.

CONCLUSION

Plaintiff requests that its Motion for Summary Judgment Boiler Inspection Act claim in Count I of his Complaint be granted and that Defendant's Motion for Partial Summary Judgment on that claim be dismissed.

JAMES B. MAYNARD

By: _____
Counsel

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Post Office Box 5369
Virginia Beach, Virginia 23455

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed and faxed to all counsel of record this 30th day of December, 1993.

_____
Otis K. Forbes, III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,
Plaintiff

v.

CIVIL ACTION NO.
92-0163-A

NORFOLK AND WESTERN
RAILWAY COMPANY,

Defendant

AFFIDAVIT

I, James B. Maynard, make the following Affidavit based upon my personal knowledge and certify that I am competent to testify to the matters stated herein:

1. The spark truck at Richlands, Virginia is not used for the repair, maintenance or inspection of engines. There are no repair facilities or maintenance facilities at Richlands, Virginia. Engines are inspected, repaired and readied for use in Bluefield, West Virginia, and brought to Richlands, Virginia for their use.

2. When I mounted Engine 3218 at approximately 2:20 a.m. on November 1, 1990, I attempted to open the door at the short head end of the engine to get to the console and start the engine so that I could go to Cedar Bluff, Virginia, meet with a train of empty coal cars and push those cars and engines over the mountain so the other train could deliver the empty coal cars to a mine in Wyatt, West Virginia.

3. Reports that I filled out regarding equipment on my engine were turned in after my tour of duty.

4. On November 1, 1990, I had no other engine to use other than 3218, and there were no car inspectors or carmen present to repair the defective door.

_____
James B. Maynard

Subscribed and sworn to before me this

_____ day of January, 1994, by James B. Maynard.

_____
Notary Public

My Commission Expires:

_____

Q But you did say skeptical, also?

A Yes, because I only see them one time, so certainly one had to be skeptical enough to prove or try to disprove their symptoms and honesty on that visit.

MR. FORBES: Thank you.

MR. MASSIE: No further questions.

THE COURT: Do you have another witness?

MR. MASSIE: Defendant rests.

THE COURT: Any rebuttal?

MR. FORBES: No, Your Honor.

THE COURT: Both sides rest. Court will remain in session. The jury will go out at this time. Ladies and gentlemen, we'll be approximately a half hour or so before we begin closing arguments, so you'll be at ease in your

jury room for awhile.

(The jury retired to the jury room.)

THE COURT: All right, gentlemen. We're going to go on the record here. I'll first hear any motions you have and in the meantime the clerk is handing you a proposed form verdict, but we'll get to that in a minute. So, at this time, put any motions on the record.

MR. FORBES: Your Honor, plaintiff would briefly like to renew his motion for summary judgment on the Boiler Inspection Act claim. The plaintiff believes it's given sufficient evidence to the Court to show that there is not a genuine issue of material fact in this case, namely whether Jim Maynard was injured on a door which was defective and unsafe. Again, we don't believe that the defendant has shown specific facts which

would negate that, and again, we renew our motion for summary judgement on that part of our claim. Thank you, your Honor.

THE COURT: Overruled.

Q All right, sir. When you report to work, are you assigned a certain job?

A Yes, sir.

Q Are you also assigned a certain engine that you have to work with?

A Yes, sir.

Q Where were you working in the latter part of 1990, Ben?

A Richlands, Virginia

Q What type of jobs were you doing?

A I was on a mine run, a shifter, that would deliver empty coal hoppers to mine operations and pull the loads away from the operation.

Q By the loads you mean the coal cars that were full of coal?

A Right. Delivering the empties and they'd fill them up and we'd pull the loads.

Q Where did you report to work?

A Richlands, Virginia.

Q In Richlands, Virginia are there any repair facilities there?

A No, sir.

Q Okay. Do you know where the engines are repaired?

A The repair work is mostly done in Bluefield or Roanoke, I think.

Q And when the engines are repaired in Bluefield or Roanoke, what happens to the engine?

A Well, they take them in, whatever it is that needs repairing, you know, if they can't repair it in Bluefield, they normally send them on to Roanoke.

Q And then how do they get to where they're, to you?

A Well, a crew, a pull crew will set engines off, or a crew, I might report to

Bluefield, which I'm working out of Bluefield now, and get unites out of Bluefield and tat them and leave them in Richlands.

Q Okay. Do you recall being assigned to an engine 3218 sometime prior to November 1 of 1990?

A Yes, sir.

Q Do you recall what day that was?

A Well, October 31.

Q And where did you have that engine, Ben?

A I got on it in Richlands, Virginia when I reported. We went to Amonate, Virginia that day to work the mines.

Q Do you recall having any difficulty with that engine on October 31, 1990?

A Yes.

Q What difficulty did you have with it?

A Opening the door into the cab

department from where I controlled the engine.

Q Okay. Do you remember which door it was that you had trouble with?

A Yes, sir.

Q Which door was that?

A It was the door going into what we called the short hood end.

Q I'm going to show the ladies and gentlemen, and hopefully you, a picture of a railroad engine. I want you to show them, if you can, show the witnesses, the jury, if you can, what door you're talking about.

A This door right here.

Q Okay. Tell the ladies and gentlemen of the jury what problems you had with that door.

A Getting it to open.

Q What did you do when you found that

you had difficulty with the door being open?

A Well, once I did get it open and got inside, and then went through the units and inspected them, my job the rest of the day was in the locomotive compartment. The brakeman would come, the brakeman or conductor, if they come in, that short hood is the easiest end to come in because you don't have to walk down that long runway, platform. I would sit there and have to put my foot on the door handle and hold the door handle down and haul off and kicked the door to get it to open.

Q When you first encountered trouble with the door, were you on the outside of this engine?

A We I on the outside?

Q Yes, sir.

A Yes, sir. I went up the short, the

steps there and went to that door, and then had a read hard time getting the door to open.

Q Did you pull on the door?

A Oh, yes, yes, sir.

Q All right. When you kicked the door open when you got inside, did you get a chance to look at the door?

A Yes, sir.

Q What did you see?

A Well, I see where the door when it shut, when it would close was coming too far in past where it was supposed to stop. It was coming too far in, and then on the inside it was where somebody had taken some instrument and done some beating on the door.

Q All right, sir. Have you seen doors like this before?

MR. MASSIE: Objection, unless it

pertains to this unit.

THE COURT: Overruled.

BY MR. FORBES (Resuming):

Q Have you seen doors in this condition before, Mr. Burnette?

A Not this bad.

Q The condition of the door you saw on October 31, 1990 is that something that occurs over time in you experience?

A Yes, sir.

Q Did you report the door?

A Yes, sir.

Q And I don't know if the ladies and gentlemen of the jury know, but what do you mean by reporting the door?

A We have a work report called an ME-60 report that when I get on a set of units or unit, I'm supposed to inspect those units and any, well any mechanical problems I'd have during my tour of duty, or anything

with the equipment that's not right or so, I have to put it on the ME-60 form, and I made the report on this ME-60 form about this door on the unit.

Q Why did you report the door on the unit?

A It was hart to get open. Anything that you find on the units that are, like I say, if they're not operating right you're supposed to report it on these ME-60 forms.

Q Did you have an opinion whether the door was safe to operate at this time?

MR MASSIE: Objection, conclusion.

THE COURT: Sustain the objection.

BY MR. FORBES (Resuming):

Q Do you know what happens to these reports, Mr. Burnette?

A Well, in Bluefield where there's work

forces, round house for men, they will usually take these reports off the engines and see what's wrong with it and have it repaired. I believe it goes to what they call the master mechanic's office, and he is supposed to check it, too, to see any repairs are done to them.

Q And which engine did you have?

A It was a 3218.

Q I'd like you to take a look at a picture of an engine that's been shown to the ladies and gentlemen of the jury, and ask you if that appears to be a similar type of engine the one that you were operating on the day that you were injured.

A Similar.

Q All right, sir. Same body type?

A Same body type. It thing the hand brake right here, I think, on 3218 was on the front of the engine.

Q The long hood?

A I think it was, yes, sir.

Q All right. But as far as the location of the door and the steps and so forth, that's substantially similar to the engine you had?

A Right.

Q All right. Thank you, Jim. Where did you report, Jim?

A I reported to Richlands. Virginia.

Q Did you report to a yard office or something like that?

A Yes, I did.

Q Where was engine 3218 located?

A It was on the, we call it the spark track. It's a holding track for these engines.

Q Are there any repair facilities there in Richlands?

A No repair facilities. If engines are to be repaired, they're taken to Bluefield or Roanoke.

Q Would there have been any carmen assigned to that area at that time?

A Not Richlands.

Q Were there any other engine located

there at that time?

A Not, no.

Q How was the lighting that evening?

A It was fairly dark. It was just, we had the reflective light form across the street and light form the back of the yard office.

Q Once you received your assignment and so forth, tell the ladies and gentlemen of the jury what you did when you mounted this engine.

A Well, I mounted the engine, and we always reached to open the door, and I reached up to open the door and twist it, and when I twisted and pulled, the door wouldn't open, and I gave it just a normal twist and pull. So, in order to, I knew it was going to take some force, so I turned around and I had, there's a grab iron, a railing, and I put my hand on that, and I

reached with my left hand and took the handle, and I pulled it and jerked it at the same time with a great deal of force. And then at that time, I had a , like an electrical shock and just went straight up into my neck, across my elbow and my fingers tingled.

Q Just so we're clear, if you and for everybody, could you, we've got a picture of a railroad locomotive here, Mr. Doss. Where is the short hood end?

A This is the short hood door here on the short end of the engine here.

Q All right sir. Did you have an occasion to look at that door?

A Yes, sir, I did. After we got through delivering the empties, I got up on the engine to get ready to go back to the head end, that's to the west end of Wyatt there to get back on our train, and Mr. Maynard, he picked up me, and also the brakeman, and took us back over tot he head end. When I got up on the engine that's when he first mentioned it to me about hurting his arm. I stared to get up on the short hood lead. So, I got up on the hood lead and that's

when he was telling me about the door.

Q Mr. Doss, did you try to open the door on the short hood lead?

A Yes, sir, after I got in there I tried to open the door and it wouldn't open, and I had my flagman, brakeman, Harris, to turn the handle in an open position, and then I put my foot against it and it wouldn't come open, and I kicked it a couple of times, and it finally did come open.

Q When the door came open what did you see about the door?

A The door had been sprung previously to that time, and it had been sprung and looked like where somebody had been banging on the door with some object or another trying to open the door before.

DIRECT TESTIMONY OF RONALD TESTER

Q On November 1, 1990 were you asked to inspect engine 3218 for a door problem?

A Yes, sir.

Q Who asked you to do that?

A It was either Mr. Freddie Stepp or our car foreman, Paul Dupree (phonetic) from Carbo.

Q Did you actually go and make the inspection?

A Yes, we did.

Q About what time did you get there on November 1?

A Approximately 1:30 or 2:00 in the afternoon.

Q Who was there when you got there?

A Mr. Stepp was there.

Q Did anybody go with you?

A Yeah. Another carman, Steve McGlothlin.

Q Were you told that there had been an injury involving that door?

A I believe we were told that there had been an injury, but I can't remember who told us that, whether it was another engineer or who told us, but seems to me we were told that.

Q Which door did you examine?

A It was the short hood lead door.

Q Was there a problem with that door?

A Yes.

Q And why kind of problem was it?

A The door would stick, when you shut the door. It would just lock up. When you tried to open it, it was real hard to o.....get open.

Q Was it working properly?

A No.

Q What did you do with the door when you found out it wasn't working properly?

A We locked it shut, taped bad order tags, orange tags to the glass on the inside and out, and wrote on them do not use.

Q Why did you do that?

A Just so no one would use it.

Q Were you able to find out what was causing the doors to stick like that?

A Yeah. From what we could tell, the rubber seal in the door was bad. When you shut the door, when you slammed the door shut, it was, it would make it wedge very tight. Instead of just closing flush, it would wedge into it.

Q Does a rubber seal like that go bad over night?

A No, I wouldn't think so.

Q Does it take a long time to develop that kind of a condition?

A I would say.

Q Now, should the seals be replaced when they go bad like that?

A Sure.

Q Now when you saw that his was the problem and you bad ordered the door, did you do anything beyond that?

A No other than lock the door and put the orange tags on it.

Q You went around the long hood end and went into the other end of the engine. What did you do when you got into the cab?

A I sat down in the engineer's seat and I turned around and took the handle, and then I gave the door a kick, actually with both feet, and opened the door.

Q Did you get a look at the door when you got it open?

A After I started the engine and got the lights on I did.

Q All right. And tell the ladies and gentlemen of the jury what the door looked like.

A Well, it had the top, it had been beaten, looks like with a hammer or whatever, and the door was, had come to the inside of the facing. There was like a wedge that started outside and came down

here to the handle.

Q Did you notice anything about the sealing on the door?

A I really didn't pay any attention to the sealing because I saw the way the door was beat up, and everything, and the way the thing had been wedged inside I didn't pay any attention to the sealing.

Q Jim, in your experience is that the kind of condition of a door that, in your experience, happens overnight?

A No, it doesn't.

Q Had you been on that unit before?

A Not the 3218 that I recall.

Q All right. There's been some testimony the railroad has admitted the door has been reported. Did you know the door had been reported?

A No, I didn't.

Q Did anybody tell you about the

condition of the door prior to you getting on it on November 21, 1990?

A No.

Q Do you know of any reason why they couldn't have told you about the door when they called you to work?

A The engine shouldn't have been there. It should have ben in Bluefield for repair when it was first reported.

Q Jim, did you ever use your shoulder to open that door at any time?

A No, I didn't.

Q What did you do after you got the door open?

A Well, I got the engine ready, and I think I contacted the dispatcher or I had the signal to come off the spark track to go up into the siding to go to Cedar Bluff.

Q Well, why did you leave if the door was in such a condition like that?

A Well, I knew that at that time, well, there was nobody around to repair it, nobody to, no repair facilities, and it would have delayed a crew for a long time to have called someone from Bluefield, and also I was there to warn anybody in case somebody tried to use the door until I got back. Mr. Stepp wasn't there at that time. He was the trainmaster.

Q All right. Did you report, did you report your condition to the dispatcher?

A On the way back to Richlands I reported it, I called the dispatcher and I told him that I had a problem with the door, and I'd like for Mr. Stepp to meet me there at the yard office so he could inspect the engine and make the decision as to what to do.

Q Who was Mr. Stepp?

A Mr. Stepp is sitting over here. He's

the yardmaster at Richlands.

Q What happened when you returned to Richlands?

A They had me lined up to go in on the , they told me to get in on the spark track where i got the engine previously, and go to the yard office and wait for Mr. Stepp because he hadn't arrived yet.

Q All right. Did you go -- what else did you do while you were in Richlands?

A I talked to the dispatcher, and he told me that they were going to relieve me and take me to the hospital because I had been injured.

Q Did you have any quarrel with that?

A No.

Q How was your arm doing at that time?

A It was still sore.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD
Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

PLAINTIFF'S MOTION TO SET
ASIDE THE VERDICT AND TO GRANT
A NEW TRIAL AND BRIEF IN SUPPORT

II

The Court committed error in denying plaintiff's Motion for Summary Judgment and in granting defendant's Motion for Partial Summary Judgment with respect to the Boiler Inspection Act claim in Count I of the Complaint.

Prior to the trial of this case, plaintiff filed a Motion for Summary Judgment with respect to the BIA claim in Count I of the Complaint. Plaintiff shoed that there was no genuine issue as to whether the door to engine 3218 was defective and unsafe and that such violation of the Boiler Inspection Act

caused injury to the Plaintiff.

Defendant filed a Motion for Partial Summary Judgment in response and argued that Defendant's engine was not "in use" at the time of his accident because he was inspecting the engine when he opined the door. This Court denied plaintiff's Motion for Summary Judgment, granted plaintiff's Motion for Partial Summary Judgment and ruled that the engine was not ready for use because plaintiff has the responsibility of inspecting the engine before leaving the yard and would have also been responsible for reporting a defect prior to leaving.

Plaintiff respectfully requests that the Court reconsider its ruling with respect to plaintiff's Boiler Inspection Act claim of Count I of the Complaint. The facts which are presented to the Court by plaintiff's Motion for Summary Judgment, in

his reply to defendant's Motion for Partial Summary Judgment, and during the trial of this case clearly shows that engine 3218 was "in use" when plaintiff attempted to take the controls on November 1, 1990.

The fact that plaintiff had the responsibility of inspecting the engine did not take the engine out of "use". Plaintiff testified by affidavit and during the trial that if he found a problems with this equipment that he turned in his report after his run. There were not other engines for him to use and their were no carmen available to repair the engine. The spark track in Richlands, Virginia was not a part of the maintenance facility but was used to park engines which were ready for use. The engine was not withdrawn from service and taken out of use until after plaintiff's injury.

This Court has taken a restrictive view of whether an engine is "in use" for purposes of the Boiler Inspection Act. The Court in Angell warned that such a restrictive view should not be taken. In Angell, the plaintiff was injured after an engine had been repaired at a maintenance facility and during the uncoupling of that readied engine. Defendant argued that such activity was excluded from Boiler Inspection Act because the railroad officials did not consider that an engine was "in service" until the engine had been "okayed" by the mechanical department and a crew had been "called" to the train. The Court found that such an argument would exclude any activity occurring between servicing and preparing the engine up until the time the engineer takes controls and ruled that such an interpretation would

contravene legislative purpose behind the Boiler Inspection Act. The Court thereby found that such activities were included in the Boiler Inspection Act. Angell 618 F.2d at 262. Clearly the court's findings in this case are in error given the Fourth Circuit's ruling in this case are in error given the Fourth Circuit's ruling in Angell. Plaintiff's injury clearly occurred after the engine had been serviced at a maintenance facility and when he was attempting to take the controls of a "readied" engine. His act of opening the engine door clearly fell within the coverage of the Boiler Inspection Act.

Because of the court's rulings, the jury was improperly and incompletely instructed as to the applicable theories of law in this case. Their verdict was therefore made in error. Plaintiff

respectfully requests that this Court reconsider its rulings with respect to the Boiler Inspection Act claim in Count I of the Complaint, set aside the jury verdict with respect to Count I of the Complaint, and order a new trial whereby plaintiff will be allowed to pursue Count I of the Complaint under the Boiler Inspection Act and Federal Employers' Liability Act.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD
Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

NORFOLK AND WESTERN RAILWAY COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT AND TO GRANT A NEW TRIAL

B. THE COURT WAS CORRECT IN ITS DECISION WITH RESPECT TO THE PLAINTIFF'S BOILER INSPECTION ACT CLAIM.

The plaintiff also complains of the Court's decision on the cross motions for summary judgment holding that the Boiler Inspection Act does not apply. This issue was fully briefed and argued before trial, and the Court correctly held that the engine was not in use on Norfolk and Western's line at the time of the accident. The plaintiff presents no new authorities on this question, but merely repeats the

same arguments that the Court previously considered and rejected. The Court's decision on the applicability of the Boiler Inspection Act was plainly right, and the plaintiff's motion to reopen and reargue this matter should be denied.

The relevant evidence pertaining to the plaintiff's Boiler Inspection Act claim, in the form of pre-trial affidavits, is undisputed. The plaintiff reported to work at r about 2:25 a.m. on November 1, 1990. His assigned engine for that day sat "cold" and by itself off the main railroad line on a "spark track" at the Richlands yard. A spark track is a place where locomotives are parked when non in use. The plaintiff like other engineer beginning their shift, was supposed to inspect the unit before taking it out on the line. The plaintiff had not completed his inspection

when the accident occurred. And, at the time of the alleged injury, the unit was neither in use, nor ready for use on the railroad's line.

Angell is again cited by the plaintiff as authority for application of the Boiler Inspection Act to Count I of his Complaint. Again, however, such reliance is misplaced. in concluding that the Boiler Inspection Act did apply, the Court in Angell was careful to point out that "all servicing, maintenance and inspection work had already been performed and the engine was being moved to its place in the consist." Id. 618 F.2d at 261 (emphasis added). Regarding the purpose of Boiler Inspection Act, the Court also explained:

> [T]he intent of the [BIA] is to exclude from its coverage only such functions are necessary to detect and correct those defective conditions for which absolute liability will be

imposed.

Angell, 618 F.2d at 262 (emphasis added).

In the present case, the plaintiff encountered the stuck door before the engine had been fully inspected and made ready for use on Noroflk and Western's line. The granting of Norfolk and Western's motion for partial summary judgment as to the Boiler Inspection Act claim is consistent with the purpose and exclusions of the Boiler Inspection Act and falls squarely within the holding of the Angell case. Accordingly, the Court's ruling as to the plaintiff's Boiler Inspection Act claim is correct and should not be disturbed.

Supreme Court, U.S.
FILED
SEP 20 1995
CLERK

No. 94-2106

In The

Supreme Court of the United States

October Term, 1995

JAMES B. MAYNARD,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

At the time of the accident, the Boiler Inspection Act, 45 U.S.C. § 23,[1] made it unlawful for a railroad "to use or permit to be used on its line" a locomotive engine that was defective and unsafe. In this action by a railroad employee who allegedly strained his elbow attempting to open a stuck engine door, the question presented is whether the engine was "in use" under the statute when the engine was parked alone on a side track with its motor off and could not be moved without a predeparture inspection that had not taken place.

---

[1] Following the accident, the Boiler Inspection Act was amended and recodified by 49 U.S.C. § 20701.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 29.1, respondent Norfolk and Western Railway Company states that it is a subsidiary of Norfolk Southern Railway Company, which, in turn, is a subsidiary of Norfolk Southern Corporation, a publicly traded company. Respondent does not have any nonwholly owned subsidiaries.

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No. 94-2106

In The

Supreme Court of the United States

October Term, 1995

JAMES B. MAYNARD,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner James B. Maynard ("Maynard") seeks to recover under the Boiler Inspection Act ("BIA" or "the Act") for personal injuries allegedly sustained on November 1, 1990, while working for respondent, Norfolk and Western Railway Company ("Norfolk and Western" or "the railroad"). After thorough review of the facts, both the district court and Fourth Circuit concluded that the engine in question was not "in use" on the railroad's line and that the BIA did not apply. Maynard now petitions for further review by this Court.

A determination of whether the engine was "in use" on the railroad's line at a particular time necessarily requires careful attention to the facts. In his petition, however, Maynard does not fully address the pertinent facts. Norfolk and Western therefore submits this statement to clarify the record.

On the morning in question, the engine was sitting on a "spark track" at the railroad's yard in Richlands, Virginia. A spark track is a side track where locomotives are parked when they are not being used. When an engine is on a spark track it is off the main line and not in use. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 9, 22-23; Appendix to Brief in Opposition ("Br. Opp. App.") at 2, 4.

Before Maynard arrived, the engine was unattended. Its motor was off, and it sat alone and idle on the spark track. Pet. App. at 9, 22-23.

Before taking the engine out on the line, Maynard had to make an inspection for defects. Pet. App. at 9, 11, 23-24, 44. At the time of the accident, Maynard had not made the required inspection. Pet. App. at 9, 11, 64-65, 74; Br. Opp. App. at 3-4.

If the inspection revealed any defect rendering the engine unsafe to operate, Maynard was required to report the condition to a supervisor. Pet. App. at 11; Br. Opp. App. at 3-4. Maynard was not allowed to take unsafe equipment out on the line. *Id.* If the engine could not be repaired at the site, it would be sent to a shop for repairs.

The incident occurred just after Maynard reported to work and before he had started the engine or completed

the required inspection for defects. As Maynard prepared to enter the cab of the engine, he discovered that the door was stuck. Instead of entering the cab through the other door, Maynard pulled on the stuck door with full force, allegedly straining his left elbow. Pet. App. at 64-65.

Maynard then entered the cab of the locomotive through the other door and continued with his duties. Pet. App. at 72, 74. Later that day, Maynard reported the incident to his supervisor. The supervisor took Maynard to a doctor to be examined. Pet. App. at 75. Maynard was given an ace bandage and told to return to work.

Maynard's amended complaint contained two counts. In count I, Maynard sought to recover for injuries sustained in the incident with the door. Count I was based both on the Boiler Inspection Act, which is a strict liability statute, and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, which requires proof of negligence.[2] In count II, Maynard sought to recover for other injuries allegedly sustained in different incidents after he returned to work. Count II was based solely on the FELA.

Before trial, the district court granted Norfolk and Western's motion for partial summary judgment on the BIA claim. Pet. App. at 1, 14. At trial, the jury found that the railroad was not negligent under either count I or count II, and the district court entered judgment for the railroad. Pet. App. at 16, 18. Maynard appealed. The

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[2] In count I, Maynard also sought to impose liability under the Safety Appliance Act ("SAA"), 45 U.S.C. § 11, *amended and recodified by* 49 U.S.C. § 20302 (1994). Before trial, however, Maynard abandoned his SAA claim, and the district court dismissed that claim with prejudice. Pet. App. at 6.

Fourth Circuit affirmed the judgment as to both the FELA claims and the BIA claim. Br. Opp. App. at 1-5.[3]

Maynard has filed a petition for a writ of certiorari on his BIA claim. The judgment in favor of Norfolk and Western on the FELA claims has become final.

SUMMARY OF ARGUMENT

This case turns on its facts. There are no pressing or unresolved legal issues in the case. Nor is there any conflict in the circuits. The decision is plainly right.

ARGUMENT

I THIS CASE INVOLVES THE APPLICATION OF SETTLED LAW TO THE FACTS AND THE DECISION IS PLAINLY RIGHT

This case presents no new or unresolved federal issue. Instead, it involves only the application of clear principles to the peculiar facts of Maynard's accident. Both the district court and the Fourth Circuit analyzed the facts and concluded that the Boiler Inspection Act did not apply. The fact that Maynard disagrees with their conclusion does not justify review by this Court.

An engine must be in use on the railroad's line for the BIA to apply. 45 U.S.C. § 23, *amended and recodified by*

[3] Because of errors and omissions in the reproduction of the Fourth Circuit's opinion in the appendix to the petition, respondent has appended the full opinion to this brief.

49 U.S.C. § 20701 (1994). It is uniformly recognized that the Act does not apply where an engine is undergoing maintenance, repairs, or an inspection for defects before use. *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (car not in use under SAA during inspection before departure); *Pinkham v. Maine Cent. R.R.*, 874 F.2d 875 (1st Cir. 1989) (engine not in use when placed in yard for repairs); *Steer v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983) (train being inspected and repaired not in use); *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979) (engine being moved on service track not in use); *Tisneros v. Chicago & N.W. Ry.*, 197 F.2d 466 (7th Cir. 1952), *cert. denied*, 344 U.S. 885 (1954) (idle locomotive not in use when being readied); *Lyle v. Atchison, T. & S.F. Ry.*, 177 F.2d 221 (7th Cir. 1949), *cert. denied*, 339 U.S. 913 (1950) (idle locomotive parked at inspection pit not in use).

To be sure, factual issues arise as to when all necessary maintenance, repairs, and inspections have been completed. *Compare Angell v. Chesapeake & O. Ry.*, 618 F.2d 260 (4th Cir. 1980) (maintenance and inspection complete) *with Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (inspection not complete). But the standard for liability is well settled and requires no clarification by this Court.

In accordance with the BIA and cases interpreting it, the district court and the Fourth Circuit properly held that the engine was not in use on the railroad's line at the time of the accident. The engine was in a yard on a special track where engines are parked when they are not in use. The engine was not being operated and could not be taken out on the line until it had been inspected for

unsafe conditions. When Maynard encountered the stuck door, the engine was idle, and the inspection had not been completed. Under the facts, the district court and the Fourth Circuit properly concluded that the BIA did not apply, and reexamination of the case by this Court is not justified.

II THERE IS NO CONFLICT WITHIN THE FOURTH CIRCUIT OR AMONG THE CIRCUITS OR WITH PRECEDENT OF THIS COURT

In his petition, Maynard tries to create conflicts in the cases interpreting and applying the BIA, but none exists.

Maynard first argues that the panel's decision in this case cannot be reconciled with the Fourth Circuit's prior decision in *Angell v. Chesapeake & Ohio Ry.*, 618 F.2d 260 (4th Cir. 1980). The panel in this case, however, did not see any conflict with the court's prior decision in *Angell*. In fact, the panel in this case cited and relied upon *Angell*. Br. Opp. App. at 3-4.

In *Angell*, the court held that the BIA applied when an engine was being moved off a service track after the required maintenance and inspection had been completed. In the present case, the court determined the BIA did not apply when the engine remained idle on a spark

track and the required inspection had not been completed.[4]

Nor does the decision in this case conflict with decisions from other circuits. Rather, the Fourth Circuit found support for its conclusion in decisions from the First, Fifth and Tenth Circuits. Br. Opp. App. at 4. See *Pinkham v. Maine Cent. R.R.*, 874 F.2d 875 (1st Cir. 1989) (unit in yard for repairs not in use under BIA); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (car not in use under SAA during inspection before departure); *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979) (engine not in use under BIA when not engaged in moving traffic).

Maynard's reliance on *Holfester v. Long Island R.R.*, 360 F.2d 369 (2d Cir. 1966), is misplaced. In *Holfester*, the unit was already in service on a live track with its lights on and motor running. Likewise, the district court's decision in *Rivera v. Union Pacific R.R.*, 868 F. Supp. 294 (D. Colo. 1994), does not help Maynard. In *Rivera*, the engine had already been checked, started, and coupled to other cars when the engineer boarded the unit.

Finally, the decision in this case does not conflict with *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10 (1938). *Brady* was decided under the SAA, which made it unlawful for a railroad "to haul, or permit to be hauled or used on its line" any car not having certain safety features. 45 U.S.C.

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[4] If the decision in this case had actually conflicted with the prior decision in *Angell*, Maynard could have sought rehearing en banc. Fed. R. App. P. 40; Local R. Fourth Cir. 35. Maynard did not do so.

§ 11, *amended and recodified by* 49 U.S.C. § 20302 (1994). In *Brady*, the railroad had already put the car out on its line when the accident occurred. Because the car was in the middle of its journey and "had not been withdrawn from use," the Court held that the SAA applied. 303 U.S. at 13. Here, of course, the engine was still on the spark track and had not been put into use when the accident occurred.

Maynard argues that as a locomotive engineer he was within the class of persons protected by the BIA. Petition at 22-23. This is no doubt true if the BIA applies. For the BIA to apply, however, the engine must be in use on the railroad's line. Maynard's engine was not, and his strict liability claim was properly dismissed.

By limiting the scope of liability to locomotives in use on the railroad's line, the BIA affords the railroad an opportunity to conduct inspections and discover defects in its engines before they begin operations. During this inspection period, a railroad is liable for negligence, but it is not strictly liable under the BIA. The Court should decline Maynard's invitation to broaden liability under the Act and the cases interpreting it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 20, 1995

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES B. MAYNARD, *Plaintiff-Appellant,* v. NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant-Appellee.*	No. 94-1285

Appeal from the United States District Court
for the Western District of Virginia, at Abingdon.
Glen M. Williams, Senior District Judge.
(CA-92-163-A)

Argued: February 1, 1995

Decided: March 27, 1995

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Francis Paul Hajek, WILSON & HAJEK, P.C., Virginia Beach, Virginia, for Appellant. Richard Edward Ladd, Jr., PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

ON BRIEF: Otis K. Forbes, III, WILSON & HAJEK, P.C., Virginia Beach, Virginia, for Appellant. Wade W. Massie, PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

James B. Maynard, a locomotive engineer, strained his left elbow on November 1, 1990, when he tried unsuccessfully to open a stuck cab door to Locomotive 3218, owned by his employer, Norfolk and Western Railway Company. The injury occurred at the beginning of Maynard's work day when Maynard tried to enter the cab of the locomotive, which was parked on a side track. He sustained further injury during the two weeks after his elbow injury when he returned to work and strained his neck and shoulder from climbing onto locomotives while his left elbow was in a sling. Maynard sued Norfolk and Western for damages under the Boiler Inspection Act, 45 U.S.C. §23,* and under the Federal Employer Liability Act (FELA), 45 U.S.C. § 51. The district court dismissed the Boiler Inspection Act claim on Norfolk and Western's motion for summary judgment because the locomotive

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*Effective July 5, 1994, this section was modified and recodified as 49 U.S.C. §20701. Because this incident occurred in November 1990, we apply the earlier version.

was not "in use" when Maynard hurt his elbow. Following a jury trial on the FELA claim, the jury rendered a verdict in favor of Norfolk and Western. Maynard contends that the district court erred both in ruling as a matter of law that the locomotive was not in use and in instructing the jury on the FELA claim. He also contends the jury's verdict was against the weight of the evidence. We disagree and accordingly affirm.

The Boiler Inspection Act provided at the time of this incident:

> It shall be unlawful for any railroad *to use or permit to be used* on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. §23 (emphasis added). The Act does not impose liability on a railroad for locomotives in repair or not in use. *See Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 261 (4th Cir. 1980). In this case, Maynard had a duty to inspect the locomotive for any defects, which must be noted on Norfolk and Western's ME-60 form, as well as a duty to assure that any unsafe condition is corrected *before* putting the locomotive in use. Maynard injured

himself before he had even entered the cab of the locomotive. At the time, the locomotive was parked on a side track, dormant and unconnected to any cars. As Maynard climbed on to the locomotive, he tried to open the door to the cab with his right hand, unsuccessfully. He then tried with "full force" to open the door with his left hand, while bracing with his right hand, and strained his left elbow in the process. When that effort proved unsuccessful, Maynard went around and entered on the other side of the cab and then kicked open the stuck door from the inside. At the time of the incident the locomotive had not been inspected, the ME-60 form had not been filled out, and the locomotive had not been put into use. Accordingly, the strict liability of the Boiler Inspection Act had not yet become applicable. *See Angell*, 618 F.2d at 261-62 (train was in use when all servicing, maintenance, and repair work had been completed). *See also Pinkham v. Maine Cent. R.R. Co.*, 874 F.2d 875, 882 (1st Cir. 1989) (train not in use when en route for repairs); *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195, 1198-99 (10th Cir. 1979) (train not in use when moving interstate or foreign commerce); *cf. Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991) (train was not in use for purposes of Safety Appliance Act because the injury occurred during a predeparture brake inspection).

On the FELA claim, Maynard contends that the district court erred in refusing to instruct the jury as he requested. While the court did not instruct the jury exactly as Maynard had requested, it adequately covered the subject matter in its own form of instructions. Maynard is not entitled to have his form of jury instructions given to the jury so long as the district court adequately

instructs on the law with respect to the issues properly submitted to the jury. *See, e.g., Chavis v. Finnlines Ltd., O/Y*, 576 F.2d 1072, 1076 (4th Cir. 1978) (affirmance of the district court is required as long as the instructions, taken as a whole, fairly and adequately state the pertinent legal principles). Moreover, we note that several of the requested instructions related to damages were rendered moot by the jury's verdict for the defendant.

Finally, Maynard contends that the district court should have granted his motion for a new trial because the jury's verdict was against the clear weight of the evidence on Norfolk and Western's negligence in allowing Maynard to use a locomotive with a defective door and in allowing him to return to work with his elbow in a sling. We reject this contention. No evidence was presented showing prior knowledge by the railroad that the door was stuck, and Maynard's return to work was entirely voluntary, following advice from his personal doctor. The district court acted well within its discretion in refusing to disturb the jury's verdict.

AFFIRMED